

Exchange should monitor the use of the system during the one-year pilot period and assure the Commission that manually-executed orders and Auto-Ex orders do not receive differential treatment. Moreover, the Exchange should examine the program during the pilot period to determine whether specialists are choosing the stocks to include in Auto-Ex on a discriminatory basis.

The Commission, therefore, requests that the Exchange submit a report to the Commission by May 31, 1996, describing its experience with the pilot program. At a minimum, this report should contain the following data gathered during the first 10-month period after the start-up date for Auto-Ex: (1) The total number of issues and specialists using Auto-Ex including their percentages in comparison to the Exchange's market as a whole; (2) a break down of each issue subject to Auto-Ex during the pilot period, including each date the issue was placed on Auto-Ex and removed; (3) the types of securities being chosen for Auto-Ex (if a pattern is discernable); and (4) whether any distinguishable market condition existed when an issue was placed on or taken off Auto-Ex. The Commission is also interested in the length of time between a print in the primary market and the resulting fill on CHX for both the issues on Auto-Ex and those issues not on Auto-Ex. Any requests to modify this pilot program, to extend its effectiveness, or to seek permanent approval for the pilot program also should be submitted to the Commission by May 31, 1996, as a proposed rule change pursuant to section 19(b) of the Act.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,¹⁵ that the proposed rule change (SR-CHX-95-11) is approved for a one-year period ending on July 31, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 95-17730 Filed 7-18-95; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-35961; File No. SR-NASD-95-29]

Self-Regulatory Organizations; Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. to the Corporate Financing Rule at Article III, Section 44 of the Rules of Fair Practice Regarding Rights of First Refusal

July 12, 1995.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on June 1, 1995, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend Article III, section 44 of the Rules of Fair Practice regarding rights of first refusal. Proposed new language is in *italics*; proposed deletions are bracketed.

Rules of Fair Practice, Article III, The Corporate Financing Rule, Underwriting Terms and Arrangements

Section 44

* * * * *

(c) Underwriting Compensation and Arrangements

* * * * *

(3) Items of Compensation

(A) For purposes of determining the amount of underwriting compensation received or to be received by the underwriter and related persons pursuant to paragraph (c)(2) above, the following items and all other items of value received or to be received by the underwriter and related persons in connection with or related to the distribution of the offering, as determined pursuant to paragraph (c)(4) below shall be included:

* * * * *

(ix) any right of first refusal provided to the underwriter and related persons to underwrite or participate in future *public offerings, private placements or other financings* [by the issuer], which will have a compensation value of 1% of the offering proceeds or that dollar amount contractually agreed to by the issuer and underwriter to waive or terminate the right of first refusal;

* * * * *

(6) Unreasonable Terms and Arrangements

* * * * *

(B) Without limiting the foregoing, the following terms and arrangements, when

proposed in connection with the distribution of a public offering of securities, shall be unfair and unreasonable:

* * * * *

(v) any right of first refusal *provided to the underwriter and related persons* [regarding] *to underwrite or participate in* future public offerings, private placements or other financings which:

(1) has a duration of more than [five (5)] *three (3)* years from the effective date of the offering; or

(2) *has more than one opportunity to waive or terminate the right of first refusal in consideration of any payment or fee;*

(vi) *any payment or fee to waive or terminate a right of first refusal regarding future public offerings, private placements or other financings provided to the underwriter and related persons which:*

(1) *has a value in excess of the greater of one percent (1%) of the offering proceeds in the public offering where the right of first refusal was granted (or an amount in excess of one percent if additional compensation is available under the compensation guideline of the original offering) or five percent (5%) of the underwriting discount or commission paid in connection with the future financing (including any over-allotment option that may be exercised), regardless of whether the payment or fee is negotiated at the time of or subsequent to the original public offering;* or

(2) *is not paid in cash.*

Subsection (vi)-(xii) are renumbered (vii)-(xiii).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Background

The NASD developed its policy on the valuation of rights of first refusal in the early 1970s. Rights of first refusal are typically negotiated in connection with an issuer's initial public offering and grant the underwriter a right to underwrite or participate in any future public offerings, private placements, or other financings by the issuer for a certain period of years. The NASD values rights of first refusal as a non-cash item of compensation at one

and Jennifer S. Choi, Attorney, Division of Market Regulation, SEC, on July 5, 1995.

¹⁵ U.S.C. 78s(b)(2) (1988).

¹⁶ 17 CFR 200.30-3(a)(12) (1994).

¹ 15 U.S.C. 78s(b)(1) (1988).

percent of the offering proceeds and currently limits the duration of the right to 5 years.² To the extent that an underwriting agreement includes a provision specifying a dollar amount for the waiver or termination of a right of first refusal, it has been the policy of the NASD Corporate Financing Department ("Department") under the Corporate Financing Rule to value the right of first refusal on the basis of the specified dollar amount in place of the one percent valuation.

The NASD believes that members should be permitted to negotiate to waive or terminate a right of first refusal in the event that the issuer wishes to use a different underwriter to subsequently raise additional capital through a public or private offering of its securities, provided that amounts negotiated are limited to an amount that has some relation to the size of the subsequent offering in which the member is not participating. Because use of right of first refusal are primarily confined to certain underwriters of companies that are generally small and without significant operating history, the NASD has found that issuers negotiating with an underwriter for the first time in connection with an initial public offering often may not fully comprehend that they have agreed to extend their relationship with the underwriter for as many as five years, nor be in a position to influence the terms of the right. In addition, the NASD has observed that certain underwriters routinely negotiate to receive rights of first refusal at the time of an initial public offering and later negotiate to waive or terminate their rights, apparently without any original intent to actually underwrite any subsequent offering of securities by the issuer.

The NASD is concerned that underwriters not be permitted to avoid underwriting compensation limits by negotiating to waive or terminate a right of first refusal with no limitation whatsoever on the amount of compensation they might negotiate to receive. The NASD is also concerned that an issuer may find it difficult to negotiate appropriate underwriting compensation with a new underwriter, where the issuer has determined to sever its relationship with its former underwriter and the former underwriter requires a substantial payment to waive or terminate its right of first refusal. Finally, the NASD believes that the policy on rights of first refusal should

also protect investors, who ultimately incur the cost when an issuer compensates an underwriter for waiving or terminating a right of first refusal.

Description of Proposed Rule Change

Three-Year Duration

Currently, the NASD Corporate Financing Rule at section 44(c)(6)(B)(v) to Article III of the Rules of Fair Practice prohibits, as unreasonable, any "right of first refusal" regarding future public offerings, private placements or other financings that has a duration of more than five (5) years from the effective date of the offering. The NASD is concerned that smaller issuers entering into these agreements may not be in a position to fully evaluate the ramifications of agreeing to a right of first refusal with a term of five years. In addition since the NASD staff rarely, if ever, sees a right of first refusal with a term less than five years, the duration of rights may not be freely negotiated by the issuer and the underwriter. The NASD has determined that a right of first refusal with a duration of five years is overreaching and that a three-year period is more appropriate. The NASD is proposing to modify section 44(c)(6)(B)(v) to Article III of the Rules of Fair Practice to reduce the duration of the right of first refusal from five years to three years. That portion of subparagraph (v) referring to the proposed three-year limitation is proposed to be separated and numbered as new subparagraph (v)(1).

Number of Payments for Waiver/Termination

The NASD finds that certain underwriters routinely negotiate to receive rights of first refusal at the time of an initial public offering and later negotiate, repeatedly, to waive or terminate their rights, apparently without any original intent to actually underwrite any subsequent offerings of securities by the issuer. The NASD is concerned over underwriters receiving a "stand-aside" payment for each subsequent offering by an issuer that has established a relationship with a new underwriter, where the original underwriter is no longer providing any bona fide services to the issuer.

The NASD also is concerned that multiple stand-aside payments by the issuer to a member result in difficulty for both the member and the NASD in tracking the payments received over the term of the right. Such tracking is important in order to insure compliance with the Corporate Financing Rule's

compensation guidelines for the original offering.³

The NASD, therefore, proposes to add a new subparagraph (v)(2) to section 44(c)(6)(B) to Article III of the Rules of Fair Practice to limit a member to one opportunity to waive or terminate a right of first refusal in consideration of any payment or fee. The NASD notes that an underwriter not wishing to terminate its right of first refusal for future offerings may preserve its right by waiving its participation in a particular offering without accepting payment for such waiver.

Limitation on Waiver/Termination Compensation

The NASD believes that members should be permitted to negotiate to waive or terminate a right of first refusal in the event that the issuer wishes to use a different underwriter to subsequently raise additional capital through a public or private offering of its securities. However, the NASD believes that the amounts negotiated for the waiver or termination of the right should be limited to an amount that has some relation either to the original offering or to the subsequent offering in which the member is not participating.

The NASD is concerned that the cost to the issuer of raising additional capital may become excessive where the issuer's former underwriter requires an excessive payment to waive or terminate its right of first refusal. The NASD, therefore, proposes to limit the amount of such waiver/termination payments by adding a new subparagraph (vi) to section 44(c)(6)(B) to Article III of the Rules of Fair Practice. New subparagraph (vi)(1) would prohibit any payment to waive or terminate a right of first refusal that has a value in excess of the greater of 1% of the original offering (or a higher amount if additional compensation is available under the compensation guideline applicable to the original offering) or 5% of the underwriting discount or commission paid in connection with the future offering (including any overallotment option that may be exercised), regardless of whether the payment or fee is negotiated at the time of or subsequent to the original public offering.

The proposed provision is intended to balance the interests of former underwriters and issuers by prescribing

² See, Corporate Financing Rule at Article III, Section 44 of the Rules of Fair Practice (Corporate Financing Rule), section (c)(3)(A)(ix) and section (c)(6)(B)(v). NASD Manual, paragraph 2200D at pages 2206 and 2209.

³ The NASD anticipates that the former underwriter will contact the NASD Corporate Financing Department when it is negotiating a waiver or termination of a right of first refusal to obtain information on whether additional compensation is available under the compensation guideline applicable to the original offering.

a formula for waiver/termination payments that allows former underwriters to participate in the success of issuers, while at the same time not jeopardizing that success with a payment so large that it harms an issuer's ability to conduct and realize the benefits of a secondary offering.⁴ The proposed one percent limitation reflects the NASD's belief that it is appropriate that the former underwriter be permitted to negotiate a fee that is at least equal to the valuation of the right of first refusal in connection with the NASD's review of the original offering in the event that the issuer wishes to sever its relationship with the former underwriter.⁵ The five percent alternative limitation reflects the NASD's belief that the former underwriter that assumed the risk of distributing the issuer's IPO should be allowed to participate or equitably benefit in the issuer's subsequent offering of securities, including any overallotment option that may be exercised, regardless of whether the payment or fee is negotiated at the time of or subsequent to the original public offering.

Cash Payment Requirement

The NASD also proposes adding provision (2) to the new subparagraph (vi) of section 44(c)(6)(B) to Article III of the Rules of Fair Practice to specify that compensation to members for waiving or terminating a right of first refusal must be in the form of cash. The NASD believes this provision will limit the waiver/termination payment to a percentage of the capital raised in the secondary offering and protect the company's shareholders from dilution resulting from the issuance of shares to a former underwriter.

Additional Clarifications

The proposed rule change would revise subparagraph (ix) to section 44(3)(A) and subparagraph (v) to section 44(6)(B) to Article III of the Rules of Fair Practice to make the rule language consistent. The rule change to subparagraph (ix) to section 44(c)(A) would clarify policy that any right of first refusal provided to the underwriter

and related persons to underwrite or participate is applicable to all future "public" offerings and "private placements or other financings."

The proposed rule change would also revise subparagraph (v) to section 44(6)(B) to Article III of the Rules of Fair Practice to clarify current policy that all unreasonable terms and arrangements cited under subparagraph (v) to section 44(6)(B) shall apply to any right of first refusal "provided to the underwriter and related persons to underwrite and participate in" future public offerings, private placements or other financings.

Implementation of Rule

The NASD is proposing to make the proposed rule change applicable to filings made with the Corporate Financing Department of the NASD that are not yet effective with the SEC on the date of implementation of the rule change announced by the NASD in a Notice to Members following SEC approval. The implementation date announced by the NASD will not be more than 90 days following SEC approval of the rule change. Thus, offerings filed with the Corporate Financing Department that have not become effective with the SEC on the date of implementation announced by the NASD will be required to comply with the proposed rule change, regardless of whether the Corporate Financing Department has previously issued an opinion that it has no objections to the terms and arrangements. It is the intention of the Corporate Financing Department after the proposed rule change has been published for comment to include a notification with all correspondence with counsel to members regarding this proposed amendment to the Corporate Financing Rule.

The NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act which provides that the proposed rule change be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest in that the proposed rule change will preserve "rights of first refusal" as a valuable item of compensation to an underwriter, while protecting issuers and investors from excessive payments to waive or terminate a right of first refusal granted to a former underwriter.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The proposed rule change was published for comment in Notice to Members 94-82 (Oct. 1994). Four comments were received in response thereto and were generally opposed to the proposed rule.⁶

The major issues raised by the commenters can be generally categorized as follows: (1) The duration of a right of first refusal, (2) the number of payments permitted for waiver or termination of a right, (3) limits on waiver/termination compensation, (4) the cash payment requirement, and (5) the valuation of rights of first refusal.⁷

Duration of the Right of First Refusal

The proposed rule change would limit the term of a right of first refusal to a maximum of three years.⁸ Two commenters argued that early stage companies operate unprofitably for more than three years after an IPO and, as a result, limiting a right of first refusal to three years could prevent the underwriter from realizing the benefits of underwriting an offering for a financially stable issuer. Two commenters also argued that securities offerings of smaller issuers are inherently riskier for the underwriter than securities offerings of more financially-stable companies. Typically, small early-stage companies are not well known to the public market and, because of the size and limited

⁶ Comment letters were submitted by Lew Lieberbaum and Co., Inc.; Spelman & Co., Inc.; Kelley Drye and Warren; and Bachner, Tally, Polevoy and Misher.

⁷ Notice to Member 94-82 incorrectly stated that the NASD is proposing to amend the methodology employed by the NASD for valuing a right of first refusal, which as currently valued for compensation purposes is 1% of the gross proceeds of the offering, or the amount specified in the underwriting contract to waive or terminate the right. The incorrect rule language would have limited the compensation value of a right of first refusal to the "lesser of" 1% of the gross offering proceeds on the contracted amount. The NASD is not considering such a proposed rule change and the comments opposing this proposal, therefore, are not discussed in this filing.

⁸ Two commenters expressed concern with the proposed reduction in the maximum permissible duration of a right of first refusal from five years to three years and one commenter generally agreed that the 3-year limit was reasonable, and one commenter expressed no view.

⁴ The NASD does not include the payment to waive or terminate a right of first refusal as compensation in connection with its review of the subsequent offering of securities. The proposed rule change does not modify this practice.

⁵ For example, where the offering proceeds of the original offering were \$10 million and the new offering is to be \$150 million, with a discount of 6 percent or \$9 million, the member could negotiate a fee for waiver or termination of the right of first refusal of up to \$450,000 (5 percent of \$9 million), which is greater than 1 percent of \$10 million, or \$100,000.

resources of the underwriter or restrictions as a result of state blue sky laws, the offering is limited with regard to possible purchasers of the securities. These commenters believe, therefore, that the underwriter should be compensated commensurate with the greater risk of the IPO. One commenter suggested that there is no downside to the issuer to a five-year right of first refusal. The issuer is not obligated to use the services of the original underwriter, but rather is merely prevented from undertaking an offering with another underwriter without compensating the original underwriter. Furthermore, one commenter argued that the issuer and underwriter are free to negotiate a right of first refusal of lesser duration, and to limit expressly duration to three years would hinder the ability of an early stage company to gain access to the public capital markets by reducing the incentive to underwrite such a company's securities.

In response to the above comments, the NASD remains concerned that smaller issuers entering into these agreements may not be in a position to evaluate fully the ramifications of agreeing to a right of first refusal with terms of five years. The NASD also has concluded that such issuers are often not in a position to influence such terms. In support of this belief, the NASD finds that it rarely if ever sees a right of first refusal with a term of less than five years. The five-year maximum term is routinely included in letters of intent and underwriting agreements and appears to be presented to issuers as a usual and customary underwritten arrangement that is non-negotiable.

One commenter suggested that offerings that meet the definition of "small business issuer" under Regulation S-B of the Securities Act of 1933 (the "Securities Act") and offerings conducted under Regulation A of the Securities Act be permitted to retain a five year right of first refusal while rights in offerings of all other issuers would be limited to three years. The commenter argues that the NASD has historically acknowledged the inherent risk of underwriting small issuers by permitting a greater percentage of underwriting compensation for smaller offerings, and proposes that a comparable analysis be applied to the duration of a right of first refusal.

In response, the NASD believes the commenter's suggestion would exempt from the proposed rule change those smaller issuers who are most unable to evaluate the ramifications of the rights of first refusal and who have the least ability to influence the right's terms.

Upon review, the NASD also does not believe the 3-year limitation will reduce the ability of smaller issuers to obtain financing from members.

One commenter agreed that the three-year limitation appeared reasonable but that there should be room for exceptions. For example, the commenter suggests that if an issuer does exceptionally well during this period and issues securities of an affiliated company in a spinoff transaction, the underwriter's three-year time period should begin anew as vis-a-vis the spinoff. The NASD notes that exceptions to the Corporate Financing Rule may be granted by a Hearing Subcommittee of the Corporate Financing Committee in connection with a member's request for review of a staff determination that proposed offering terms and arrangements are unfair and unreasonable. With regard to the commenter's example, the NASD does not believe the contractual obligation of a company to its original underwriter under a right of first refusal should automatically become the obligation of that company's affiliate when it goes public through a spin-off transaction.

Number of Payments for Waiver/Termination

The proposed rule change would permit only one payment to a member for waiving a right of first refusal in connection with a subsequent financing. Upon such payment, the right would be deemed to be terminated.⁹

Commenters argued that such a limitation unfairly penalizes the underwriter and that one payment should not affect subsequent offerings during the term of the right. Despite such arguments, the NASD's concerns remain regarding underwriters receiving a "stand-aside" payment for each subsequent offering by an issuer that has established a relationship with a new underwriter when the original underwriter is no longer providing any bona fide services to the issuer. In addition, the NASD believes that multiple payments result in greater difficulty for both the member and the NASD in terms of tracking the amounts received over the term of the right in order to insure compliance with the compensation guideline of the original offering. The NASD also notes that an underwriter not wishing to terminate its right of first refusal for future offerings may preserve its right by waiving its participation in a particular offering

without accepting payment for such waiver.

One commenter argued that the NASD is unnecessarily interfering with the contractual relationship between the issuer and the underwriter, who are free to negotiate a termination of the right if they so desire. In response, the NASD notes that the Corporate Financing Rule is intended to regulate certain contractual provisions between underwriters and issuers to protect the investors in these issues. The NASD believes this provision of the proposed rule change will protect the investors of smaller issuers who are less likely to be able to influence or negotiate the termination of the right of first refusal.

One commenter argued that this provision of the proposed rule change would force members to relinquish their right for very small payment because the secondary offering is not likely to be as large as the example cited in Notice to Members 94-82 and in footnote 3 of this filing (where the original offering was \$10 million and the new offering is \$150 million). The commenter argues that an underwriter may be willing to accept substantially less to waive its right in order to allow an issuer other financing options if the right of first refusal were to remain intact with respect to future financings. In response, the NASD notes that under the proposed rule change, underwriters may waive their right to an unlimited number of times if they do not receive a payment. Therefore, an underwriter not wishing to terminate its right of first refusal for future offerings may preserve the right by waiving its participation in an offering and by not accepting payment for the waiver.

Limits on Waiver/Termination Compensation

The proposed rule change would limit the amount of any payment or fee to waive or terminate a right of first refusal to the greater of 1 percent (1%) of the original offering proceeds or 5 percent (5%) of the commission paid with respect to the subsequent offering. One commenter argued that there should be no limitation on the amount of the permitted fee for waiving or terminating a right and that any fee should be determined by arms-length negotiation between the issuer and the underwriter, who are uniquely capable of judging the value of the right. The commenter states that in many cases the right of first refusal has no value to the member because many early-stage issuers do not achieve a level of growth sufficient to warrant a subsequent offering of their securities and, therefore, the member has forfeited 1% of the original offering

⁹Three of the four commenters were opposed to limiting the receipt of compensation for waiving or terminating a right of first refusal to one time.

to obtain a right for which it derives no related benefit.

As discussed above, the NASD remains concerned about the initial capacity of smaller issuers to understand the ramifications of the right of first refusal in an IPO and its ability to influence the terms of the right. Moreover, to protect the investors in the issuer, the NASD has concluded that its concerns necessitate the restrictions contained in the proposed rule change.

The commenter also argues that it is the issuer that has the upper hand in setting the terms of the secondary offering and if the member does not agree to these terms, the issuer is free to arrange for the secondary offering to be underwritten by another member. In response, the NASD considers it unlikely that issuers intentionally set the terms of their secondary offerings to discourage the initial underwriter. The NASD believes the normal priority for issuers when setting the terms of their secondary offerings is optimum capital formation. In particular, the typical secondary offering of a small business issuer is considerably larger than the issuer's initial public offering.

The above commenter, while opposing a payment limitation, suggested in lieu of the proposed limitation that the NASD adopt a range of permissible cash payments as a percentage of the subsequent offerings depending on the size and stage of development of the issuer and the dollar amount of the offering. The commenter considers the 5 percent limitation arbitrary and suggested that payments up to 20% of the underwriting compensation of the subsequent offering be permitted to be received by underwriters of small business issuers or of offerings of less than \$25 million in order to allow a fair compensation to the member. In response, the NASD believes that a payment equal to 20% of the underwriting compensation of a subsequent offering would create a hardship for smaller issuers, and consequently their investors, in terms of reduced net proceeds and/or the ability to attract a new underwriter. The NASD's determination to base the percentage at 5% was not arbitrary but determined after considerable deliberation to balance the interests of the former underwriter and the issuer and arrive at a percentage that allowed the former underwriter to participate in the success of the issuer, while not jeopardizing the success with a payment so large that it affects the issuer's ability to conduct and realize the benefits of a secondary offering.

One commenter stated that this is an ideal proposal that serves both parties.

It ensures that the original underwriter is justly rewarded if the issuer becomes highly successful by preventing the issuer from severing all ties with the original underwriter without compensating it in a manner that is consistent with the underwriter's previously provided services and interests. At the same time, the proposed provision would permit the issuer to ascertain the actual cost of terminating or waiving the right at the time of the original and subsequent offering. The commenter also supported this proposal on the basis that it is appropriate to base the amount of payment to the original underwriter on the amount of the new underwriter's compensation.

Cash Payment Requirement

The proposed rule change specifies that compensation to members for waiving or terminating a right of first refusal must be in the form of cash. One commenter argued that the proposal to require only cash payments in consideration of the waiver or termination of a right would work to the detriment of both underwriters and issuers since early-stage companies often lack the liquidity to make substantial cash payments. The commenter believes that requiring issuers to make payments in cash could reduce working capital and damage a small company's ability to meet payment obligations, thus jeopardizing the company's ability to function as a going concern. In response, the NASD believes that a company should have sufficient cash available from the proceeds of the subsequent offering to make any necessary payment to a former underwriter holding a right of first refusal. The NASD also believes this provision of the proposed rule change is appropriate to protect the company's shareholders from the dilution resulting from the issuance of securities to a former underwriter.¹⁰

Other Comments

Two commenters addressed the NASD's statements that issuers negotiating with an underwriter often may not be in a position to influence the terms of the right of first refusal or fully comprehend that they have agreed to extend their relationship with the underwriter for five years. One commenter noted, specifically, that issuers are represented by counsel and that most issuers have knowledgeable,

competent officers who are aware of the terms of their agreement with the underwriter. This commenter argued that the proposed rule change imposes undue restrictions on the ability of underwriters and issuers to negotiate a mutually acceptable arrangement. In spite of such arguments, the NASD's concerns remain that small issuers, even with counsel, may not understand the ramifications of the right of first refusal, nor be able to influence the terms of these agreements. The NASD has often found that issuer's counsel is generally experienced in corporate law and inexperienced in securities law matters. The NASD reiterates the regulatory purposes of the Corporate Financing Rule is to protect investors in such issuers. One commenter stated that it appears that the committees of the NASD are representative of major sized firms putting forth recommendations for rule changes that will eventually give the major underwriters and wire houses more and more control of the industry. In response, the NASD notes that the standing Committees of the NASD Board of Governors consist of members from both large and small firms. The Corporate Financing Committee was the review committee for the proposed rule change and, at the time this matter was considered, was chaired by an individual representing a very small NASD member.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

¹⁰ Any such securities would, moreover, be in addition to securities that the former underwriter previously acquired in connection with the original public offering.

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File Number SR-NASD-95-29 and should be submitted by August 9, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 95-17731 Filed 7-18-95; 8:45 am]

BILLING CODE 8010-01-M

SMALL BUSINESS ADMINISTRATION

[License No. 03/03-0201]

Shenandoah Venture Capital, L.P.; Notice of Issuance of a Small Business Investment Company License

On Thursday, November 3, 1994, a notice was published in the **Federal Register** (Vol. 59, No. 212, FR 55148) stating that an application had been filed by Shenandoah Venture Capital, L.P., at 208 Capital Street, Suite 300, Charleston, West Virginia 25301, with the Small Business Administration (SBA) pursuant to Section 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1995)) for a license to operate as a small business investment company.

Interested parties were given until close of business Friday, November 18, 1995 to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 03/03-0201 on June 1, 1995, to Shenandoah Venture Capital, L.P. to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: July 10, 1995.

Robert D. Stillman,

Associate Administrator for Investment.

[FR Doc. 95-17649 Filed 7-18-95; 8:45 am]

BILLING CODE 8025-01-M

[License No. 02/02-0562]

UBS Partners, Inc.; Notice of Issuance of a Small Business Investment Company License

On Tuesday, February 28, 1995, a notice was published in the **Federal Register** (Vol. 60, No. 39, FR 10891) stating that an application had been filed by UBS Partners, Inc., at 299 Park Avenue, New York, New York 10171, with the Small Business Administration (SBA) pursuant to Section 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1995)) for a license to operate as a small business investment company.

Interested parties were given until close of business Wednesday, March 15, 1995 to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 02/02-0562 on May 24, 1995, to UBS Partners, Inc. to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: July 10, 1995.

Robert D. Stillman,

Associate Administrator for Investment.

[FR Doc. 95-17648 Filed 7-18-95; 8:45 am]

BILLING CODE 8025-01-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Reports, Forms and Recordkeeping Requirements

AGENCY: Department of Transportation (DOT), Office of the Secretary.

ACTION: Notice.

SUMMARY: This notice lists those forms, reports, and recordkeeping requirements imposed upon the public which were transmitted by the Department of Transportation to the Office of Management and Budget (OMB) for its approval in accordance with the requirements of the Paperwork Reduction Act of 1980 (44 USC Chapter 35).

DATE: July 13, 1995.

ADDRESSES: Written comments on the DOT information collection requests should be forwarded, as quickly as possible, to Edward Clarke, Office of Management and Budget, New

Executive Office Building, Room 10202, Washington, DC 20503. If you anticipate submitting substantive comments, but find that more than 10 days from the date of publication are needed to prepare them, please notify the OMB official of your intent immediately.

FOR FURTHER INFORMATION CONTACT:

Copies of the DOT information collection requests submitted to OMB may be obtained from Susan Pickrel or Gemma deGuzman, Information Resource Management (IRM) Strategies Division, M-32, Office of the Secretary of Transportation, 400 Seventh Street, SW, Washington, DC 20590, (202) 366-4735.

SUPPLEMENTARY INFORMATION: Section 3507 of Title 44 of the United States Code, as adopted by the Paperwork Reduction Act of 1980, requires that agencies prepare a notice for publication in the **Federal Register**, listing those information collection requests submitted to OMB for approval or renewal under that Act. OMB reviews and approves agency submissions in accordance with criteria set forth in that Act. In carrying out its responsibilities, OMB also considers public comments on the proposed forms and the reporting and recordkeeping requirements. OMB approval of an information collection requirement must be renewed at least once every three years.

Items Submitted to OMB for Review

The following information collection requests were submitted to OMB on July 13, 1995:

DOT No: 4084.

OMB No: 2127-New.

Administration: National Highway Traffic Safety Administration.

Title: National Survey of Drinking and Driving Attitudes and Behaviors: 1995.

Need for Information: 15 U.S.C. section 1395b, Exhibit V, gives the Secretary authorization to conduct research, testing, development, and training as authorized to be carried out by subsections of this title.

Proposed Use of Information: This information will be used by the National Highway Traffic Safety Administration in planning programmatic activity addressing the DWI problem, planning strategic forms of assistance to groups involved in improving public safety and tracking progress made in reducing the DWI problem.

Frequency: One-time only.

Burden Estimate: 1,209 hours.

Respondents: Individuals randomly selected.

Form(s): None.

Average Burden Hours Per Response: 0.3 hours.

¹¹ 17 CFR 200.30-3(a)(12).